U.S. Department of Labor

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Issue Date: 02 December 2003

CASE NOS.: **2003-LHC-982**
2003-LHC-983

OWCP NOS.: **01-141144**
01-141145

IN THE MATTER OF

WENDY FORTIER,
Claimant

v.

ELECTRIC BOAT CORPORATION,
Employer

APPEARANCES:

CAROLYN P. KELLY, ESQ.
On behalf of the Claimant

PETER D. QUAY, ESQ.
On behalf of the Employer

Before: **LARRY W. PRICE**
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Wendy Fortier (Claimant) against Electric Boat Corporation (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held in New London, Connecticut, on August 4, 2003. All parties were

afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were received into evidence:

1. Joint Exhibit 1;
2. Claimant's Exhibits 1-26; and
3. Employer's Exhibits 1-4.

The record was left open for thirty days post-hearing in order for the Parties to obtain some additional testimony via depositions. Employer's Exhibit 5, the deposition of Dr. Jack Goldstein, was received into evidence on September 2, 2003. Because the Parties requested additional time to take two more depositions, the record remained open, and Claimant's Exhibit 27, Claimant's rebuttal testimony in deposition, was received into evidence on October 6, 2003. The record remained open until Employer's Exhibit 6, the deposition of Elizabeth Sinatro, was received into evidence on October 29, 2003. The record was thereafter closed.

I. STIPULATIONS

1. The LHWCA, 33 U.S.C. § 901 et seq., as amended, applies to this claim.

2. The injuries occurred on November 12, 1991, and January 23, 1995.

3. The injuries occurred at Electric Boat, Groton, Connecticut.

4. The injuries arose out of and in the course of the worker's employment with the employer.

5. There was an employer/employee relationship at the time of the injuries.

6. Employer was timely notified of the injuries.

7. The claim for benefits was timely filed.

8. The Notice of Controversion was timely filed.

9. The informal conference was conducted on December 11, 2002.

10. The worker's average weekly wage at time of injuries: $700.90.

11. Compensation has been paid as follows:

    a. Temporary partial disability: from July 12, 1997, to August 30, 1998, at various rates of compensation; total paid: $20,800.

b. Temporary total disability: from September 21, 1998, to present.

12. Medical benefits have been paid.

13. The worker reached maximum medical improvement (MMI) on November 19, 2001.

14. The worker has not returned to her usual job.

II. ISSUES

The unresolved issues in this proceeding are:

1. Extent of disability.

2. Suitable alternative employment.

III. STATEMENT OF THE CASE

Claimant's Testimony

Claimant is a forty year old high school graduate who resides in Central Falls, Rhode Island. (Tr. 11-12). She took electronics in high school and had one year of vocational training in electronics, but her primary experience has been through on-the-job training. (Tr. 33). Claimant began working for Employer as an outside electrician in 1989. (Tr. 12). Her duties included running cables and installing, hooking up and testing units on submarines. (Tr. 12-13). The cables, which were carried by hand, ranged in size from something as small as telephone wire to battery cables weighing about fifty pounds a foot. (Tr. 13).

In 1990, Claimant sustained an injury to her left shoulder while loading cable on the boat. (Tr. 14). She reinjured the shoulder in 1991 while moving her toolbox. Claimant sought treatment at Employer's facility hospital for this injury. She was taken off work for a few days because she could not move her arm. (Tr. 15). Claimant returned to work without restrictions and did not have any further problems with her shoulder at that time.

In 1995, Claimant sustained an injury to her hands, arms and shoulders while breaking bolts with wrenches. She was twisting a bolt when she felt a sharp pain and went to the facility hospital. At the hospital, Claimant was given an ice pack and some ibuprofen and told to use her left hand instead of her right. (Tr. 16). Claimant continued working with her left hand until it also began to develop pain and swelling. The doctor at the facility hospital told Claimant to find another job. (Tr. 17).

Claimant then treated with some doctors at another hospital and underwent a few months of physical therapy, which did not offer her any relief. (Tr. 17-18). After the physical therapy, Claimant continued to have pain, swelling and aching in her hands and sometimes in her shoulders. Claimant's original restrictions were no lifting over five pounds, no pushing, no pulling and no repetitive use of the hands. (Tr. 18). She worked on tank watch for Employer, checking people as they came and went out of the hole. (Tr. 18-19).

As Claimant continued to work, some of her restrictions were lifted. She was allowed to use hand tools for at least ten to fifteen minutes a day. While using the hand tools, she pulled her left thumb tendon. (Tr. 19-20). She returned to work but was then laid off by Employer. (Tr. 20).

After she was laid off, Claimant sought alternative employment within her restrictions. In 1998, she had a temporary job at Handy and Harmon installing electrical components onto circuit boards and plating. (Tr. 21, 37). The components and racks did not weigh much, but the job involved repetitive overhead motion, causing Claimant's fingers to swell and increasing her shoulder problems. (Tr. 21, 37). Up until that time, Claimant really had not noticed any left shoulder problems, because she never used her shoulder that much while working. Claimant acknowledged, however that she might have subconsciously favored her left shoulder. (Tr. 40-41).

Claimant worked at Handy and Harmon for about four weeks. (Tr. 37-38). One day when Claimant was lifting the racks up, she "went from pain to numb." Claimant went to the emergency room, where she was referred to Dr. Jack Goldstein. (Tr. 22). Dr. Goldstein took X-rays and sent Claimant to physical therapy. (Tr. 22-23). In June 1999, Claimant underwent surgery to open up her rotator cuff to repair an impingement and stabilize her left shoulder. At the same time, Claimant underwent surgery on her left thumb. Claimant's thumb did not improve much after the surgery. (Tr. 23-24).

After the 1999 surgery, Claimant continued to experience swelling and tightening of the muscles in her left hand. In March 2001, Claimant underwent a de Quervain's tendon release surgery on her left hand, but it did not help her condition. As of this date, her thumb still does not bend the way that it did before her injury. (Tr. 24).

Dr. Goldstein eventually released Claimant to light duty work. Her restrictions included no lifting, pushing or pulling over twenty pounds and minimal repetitive hand use. (Tr. 25). With the assistance of Karen Davis, a vocational rehabilitation counselor, Claimant began looking for permanent, full-time work. (Tr. 25-26, 32). Ms. Davis gave Claimant an aptitude test and helped her to look for employment suited for her goals and interests. Claimant looked for work with temporary placement agencies and also

searched for jobs in the newspaper and on the internet. (Tr. 26). Claimant has not met with Ms. Davis since October 2002. (Tr. 39).

Through a temp agency, Claimant secured one day of employment working at a jewelry factory putting necklaces on cards. (Tr. 26-27). She earned $6.15 per hour but was only able to do the job for one day because the work caused her fingers to get stiff. (Tr. 27). On her own, Claimant found a job at an embroidery factory in which she put rings on clothing. Claimant's fingers got sore from the pushing motion that this task required, and she had difficulty driving home after work.

Since that time, Claimant has continued to look for work, particularly as a cashier, security guard or assembly line worker. (Tr. 28). She has had difficulty finding employment because she lacks experience with regard to certain kinds of work and she is overqualified with regard to other kinds of work. (Tr. 28-29). At the time of hearing, Claimant had resumes pending and had recently received a labor market survey. Although Claimant followed up on some of the jobs listed on the survey, she had not been notified by any potential employers. (Tr. 29).

Claimant testified that she went to Comp USA but did not apply for a job because there were no positions available. The duties of a customer sales person include cashiering, scanning items, bagging them for the customers and handing them change. (Tr. 30). The customer sales person could scan anything from discs to computer systems, which might weigh from fifteen to twenty pounds. (Tr. 30-31). Claimant did not think that she would be able to perform the repetitive motions required to scan items on a long term basis because her fingers would swell and she would start dropping things.

Although Claimant continues to have problems with her arm, it does not go numb as much as it did before the surgery. Claimant continues to have restrictions relating to her left shoulder and arm. (Tr. 23). She treats with Dr. Goldstein on an as needed basis for her shoulders, hands and arms and last saw him in March or April 2003. (Tr. 31). Claimant sometimes experiences aches, pains and swelling, which are increased when she does various sorts of everyday activities. (Tr. 32). Claimant has developed some problems in her right shoulder because she had to start carrying things on the right, which she was not used to doing. Her right shoulder occasionally gets stiff and hurts. (Tr. 35). Claimant has developed problems in her right hand as well, including swelling, pain shooting up her arm and, infrequently, numbness in the fingertips. Claimant has never had surgery on the right shoulder or hand. (Tr. 36).

With respect to pain, Claimant has good days and bad days. (Tr. 32). Bad days are typically triggered by something that Claimant has done during the day. (Tr. 33). On a bad day, Claimant might not be able to lift a coffee cup or use a steak knife. (Tr. 32-33). Because she tried to be very careful, she has bad days only about once a week. (Tr. 33). Claimant is able to bowl once a week as long as she has not done anything heavy

during the day. (Tr. 33-34). Before her injuries, Claimant used to bowl twice a week. She also cross-stitches, but she can no longer hold the ring while stitching and only stitches for about one or two hours total per week. Before her injuries, Claimant cross-stitched for up to five hours a day. (Tr. 34).

Deposition of Elizabeth Sinatro

Ms. Sinatro is a vocational case manager who completed a labor market survey for Claimant. (EX. 6, pp. 7, 8). In her job, Ms. Sinatro completes approximately one to two labor market surveys a week. (EX. 6, p. 8). She works with workers' compensation clients as well as clients with long-term disabilities, and she has had several successful placements. (EX. 6, p. 9). Ms. Sinatro estimated that she sees about twenty clients a month. (EX. 6, p. 18).

Ms. Sinatro advises clients with gaps in their employment history due to disability that they should address that situation on a job application in whatever manner they see fit. (EX. 6, pp. 20-21). In her opinion, it is the client's choice whether or not to disclose a disability, and each situation is different. (EX. 6, p. 21).

In making her report for Claimant, Ms. Sinatro considered Claimant's medical, educational and employment background as well as her functional abilities and transferable skills. Ms. Sinatro then conducted internet research, placed phone calls and made personal visits to find possible employers. (EX. 6, p. 7). Ms. Sinatro utilized several reference books, including the Dictionary of Occupational Titles, the Enhanced Guide to Occupational Exploration and the Classification of Jobs, Occupational Outlook Handbook, all of which are national publications. (EX. 6, pp. 9-11). She affirmed that Claimant was unable to return to her former employment. (EX. 6, p. 19).

In determining Claimant's physical limitations, Ms. Sinatro referred to a January 21, 2002 report by Dr. Goldstein, in which he stated that Claimant was able to spend six to eight hours a day walking, sitting, standing and operating a motor vehicle, two hours a day twisting, one hour per day reaching above her left shoulder, one hour per day engaging in repetitive hand movements, including pushing and pulling up to twenty pounds, and one hour a day lifting. (EX. 6, p. 12). Because Claimant's former employment was manual labor, Ms. Sinatro focused on Claimant's physical restrictions and looked for entry-level jobs which did not require many transferable skills.

Ms. Sinatro's labor market survey identified several available job opportunities for Claimant, including employment as a security guard, cashier and customer service representative. (EX. 6, p. 13). Two security guard agencies had positions within Claimant's restrictions. (EX. 6, pp. 14-15). The hiring process for Pinkerton Security included filling out an application, which was then reviewed by a placement coordinator, at which point the applicant would be interviewed and a drug screen and background

check would be conducted. (EX. 6, p. 19). Ms. Sinatro did not know whether the application process involved any testing, nor did she know how many positions were part-time as opposed to full-time. (EX. 6, p. 20). Because Claimant had no prior experience as a security guard, she would probably be compensated at the lowest level of pay. (EX. 6, pp. 21-22).

When asked about the CompUSA job, Ms. Sinatro affirmed that this job involved no lifting over ten pounds. (EX. 6, p. 22). If a customer bought a computer, the cashier would ring up the purchase on a purchase order form without having to handle the computer, which would be brought out from the stockroom. (EX. 6, p. 23). Ms. Sinatro did not, however, visit the CompUSA where she had identified the job. (EX. 6, pp. 23-24).

Although Ms. Sinatro had not visited the Home Depot where she identified a cashier job for Claimant, she testified that Home Depots typically have small counter space, and most items remain in the customer's shopping cart, where they are scanned by a hand wand. Ms. Sinatro affirmed that Home Depot sells paint; she was unaware of the weight of a five-gallon can of paint. (EX. 6, p. 24). She also did not know where the bar code is located on a can of pain. (EX. 6, pp. 24-25).

Ms. Sinatro was unaware whether most jobs at CVS are full-time or part-time positions. (EX. 6, p. 24). She also was unaware whether the security guard position was still available at the time of her deposition. (EX. 6, p. 14).

Since preparing her report, Ms. Sinatro had reviewed Dr. Goldstein's deposition as well as some vocational case management reports, neither of which changed her original opinions for the most part. (EX. 6, p. 6). Based on her review of Claimant's updated medical information, however, Ms. Sinatro no longer believed that Claimant was able to do the customer service representative jobs identified in the survey. (EX. 6, p. 17).

Ms. Sinatro has never met Claimant, nor did she attend Claimant's hearing. (EX. 6, pp. 17-18).

Claimant's Rebuttal Deposition

After receiving Ms. Sinatro's labor market survey, Claimant made an effort to look at all the jobs listed in the report. (CX. 27, pp. 5-6). At Shaw's Supermarket, Claimant filled out an application for security guard and cashier. On the application section about employment history, Claimant indicated that she was unemployed and on workers' compensation. (CX. 27, p. 6). While at Shaw's, Claimant observed the cashiers and noted that their registers sat above shoulder height and that cashiers had to lift items to scan them. (CX. 27, pp. 6-7). She saw cashiers scanning several types of items which would exceed her weight lifting restrictions. (CX. 27, p. 7). Shaw's never contacted

Claimant about a job after she put in her application. (CX. 27, p. 8). Claimant knows someone who works as a cashier at Shaw's for a maximum of twenty to thirty hours a week with no opportunity to work additional hours. (CX. 27, pp. 15-16).

Claimant filled out an application with Pinkerton Security while she was at a job fair. (CX. 27, p. 8). She then had to fill out a multiple choice honesty survey, which primarily focused on the issue of stealing. In the course of answering the questions, Claimant responded that she had seen someone steal from work before but that she had never stolen from work, although she had stolen something once when she was ten years old and did not know any better. (CX. 27, pp. 9-10). Claimant also responded that an employee who steals but then returns the money should be fired. (CX. 27, p. 10). After her test results were calculated, Claimant was told that she did not meet the qualifications for a security guard and that she could reapply in six months. (CX. 27, pp. 10-11). Claimant concluded that she had failed the survey. (CX. 27, p. 24).

In her job search, Claimant did not go to Blackstone Valley Security. The jobs at the Providence Biltmore Hotel and the Ann & Hope Outlet were already filled. Claimant went to a different CompUSA from the one identified in the survey. The store was not hiring at that time. (CX. 27, p. 11). Claimant once again observed the cashiers at work, noting that the scanners are about chest-high, and nearly every item is scanned at the register. She testified that the boxes containing reams of paper would be too heavy for her to lift. (CX. 27, p. 12). She did not see very much electronic equipment go through the line, however. The scanning of items required constant and repetitive hand, elbow and shoulder movement. (CX. 27, p. 13).

Claimant observed the cashiers working at a different Home Depot than the one identified in the labor market survey. She noted that they lifted several types of heavy items, including paint, Venetian blinds, lumber, carpet and boxes of floor tile. (CX. 27, p. 14). Claimant estimated that a gallon of paint weighs between eight and ten pounds and a box of tile weighs about fifteen pounds. (CX. 27, p. 25). Most items were scanned at the counter, as opposed to being scanned in the customer's cart. (CX. 27, pp. 14-15). Claimant did not observe any cashier scanning boxes of tiles in the cart. (CX. 27, p. 25).

Claimant filled out an application at CVS. In the employment history, she accounted for all her time, including gaps in employment. Claimant never heard from CVS or from any other place where she filled out an application.

Claimant also searched for employment at places not listed on the labor market survey. (CX. 27, p. 16). She found one job as an apprentice trainee doing door-to-door vacuum cleaner sales but did not accept the job because the vacuum cleaner weighed twenty-five to thirty pounds, which exceeded Claimant's weight-lifting restrictions. (CX. 27, pp. 16-17). Claimant also applied for a job as a delivery driver at a box-making company, but she never received a response to her application. (CX. 27, pp. 17-18).

Claimant is able to drive for long periods of time as long as the vehicle runs smoothly; if the vehicle shakes or vibrates, she begins to have shooting pains in her hands. (CX. 27, p. 18).

Claimant applied for a job operating some machinery at a manufacturing company, but the company was only accepting applicants who were qualified to run the machines, and Claimant did not know what kind of machines were involved. (CX. 27, pp. 18-19).

While Claimant was at the aforementioned job fair, she met an Avon sales representative and decided to try selling Avon products. (CX. 27, p. 20). Claimant went through a sales training session and began selling the products. As an Avon salesperson, Claimant talks to people to interest them in the products, takes orders, submits orders and then packages and distributes the products. (CX. 27, p. 21). Claimant has to purchase all the books, catalogs, sales aids, training and so forth. Ten catalogs cost $5.70, or fifty-seven cents each. (CX. 27, p. 22). Ten samples cost $1. In the three weeks before her deposition, Claimant had made $170 in net profits selling Avon. (CX. 27, p. 23). She enjoys selling Avon and would like to continue doing it.

Claimant has continued to look for job opportunities in the newspaper, but she has found that the same jobs are listed over and over again. (CX. 27, p. 24).

Medical Evidence

Deposition of Jack D. Goldstein, M.D.

Dr. Goldstein is an orthopedic surgeon who began treating Claimant in December 1998. (EX. 5, pp. 4-6). Claimant presented to Dr. Goldstein with complaints of left shoulder pain. Dr. Goldstein performed an arthroscopic decompression of Claimant's left shoulder, as well as surgery on her left thumb and a de Quervain's release on the left side. (EX. 5, pp. 6-7).

Dr. Goldstein last saw Claimant in April 2003. (EX. 5, p. 7). At that time, Claimant had vague complaints of aches and pains in her arms, hands and wrists, which she attributed to her years of repetitive lifting and carrying at work. (EX. 5, pp. 7-8). Dr. Goldstein has had difficulty pinpointing and explaining some of Claimant's complaints. (EX. 5, p. 13). He felt that Claimant's condition had improved the last time he saw her and that she seemed to be "functioning at a much higher level." (EX. 5, p. 8). On January 21, 2002, Dr. Goldstein had performed a work capacity evaluation and assigned Claimant some permanent restrictions. These restrictions included reaching above the left shoulder no more than one hour per day, twisting no more than two hours a day and repetitive movement of wrists no more than one hour per day. Claimant was to push, pull and lift no more than twenty pounds one hour per day. (CX. 24, pp. 1-2). At the time of

his deposition, Dr. Goldstein felt that these restrictions were still applicable, but he noted that eventually, Claimant might be able to continue lifting the same amount of weight for longer periods of time. (EX. 5, p. 9).

Dr. Goldstein has never been asked to assign a permanent disability impairment rating to Claimant's hands or shoulders. Based on Claimant's physical condition at her last appointment, Dr. Goldstein did not believe that Claimant was a candidate for more surgery. (EX. 5, p. 11). Because of Claimant's condition, she may have difficulty with repetitive lifting, carrying and reaching. Since Claimant has been out of the work force for a prolonged period of time, she would probably be sore at the end of a work day. (EX. 5, p. 12). Dr. Goldstein suggested that this problem could be addressed through work hardening therapy to build up Claimant's activity level. (EX. 5, pp. 12-13).

Dr. Goldstein was unaware of Claimant's attempts to return to work at the jewelry company and the embroidery company. (EX. 5, pp. 9-10). He testified that if Claimant was a cashier in a grocery store, she probably would not have as much difficulty with scanning the items as she would have with lifting and carrying the items. (EX. 5, pp. 13-14). Dr. Goldstein acknowledged that scanning and lifting are repetitive wrist motions. He did not think that Claimant's shoulder was much of an issue any longer, as most of her current symptoms are hand and arm related. (EX. 5, p. 14). He pointed out that if Claimant has difficulty in picking things up with her hands, it is a moot point whether she is able to lift the items overhead. (EX. 5, pp. 15-17).

Medical Reports of Philo F. Willetts, Jr., M.D.

August 5, 1998 Visit

At the time of her first appointment with Dr. Willetts, an orthopedic surgeon, Claimant had experienced pain and swelling in her hands for the past three years and left shoulder pain for over eight years. (EX. 3, p. 1). Claimant provided Dr. Willetts with an extensive history of her physical problems and subsequent course of treatment, as well as her employment history. (EX. 3, pp. 1-5). Claimant had been put at limited duty for her hands but was eventually laid off by Employer in July 1997. (EX. 3, p. 4). After being laid off, Claimant had done a brief stint working for a temporary placement agency for a total of two days. One day was spent unloading trucks. Claimant had no difficulty with this job. The second day was spent sweeping, which produced considerable pain in Claimant's hands. She was taken off the job and was not given any further work by the temp agency. (EX. 3, p. 4). Claimant told Dr. Willetts that she would like to be retrained for another type of employment. Although she preferred to work with her hands, she did not feel that she was capable of doing this type of work. (EX. 3, p. 5).

Dr. Willetts conducted a physical examination and reviewed Claimant's medical records before diagnosing Claimant with chronic left shoulder girdle musculoskeletal

pain with probable mild impingement. (EX. 3, pp. 5-8). He found no signs of a surgical left shoulder lesion, chronic synovitis in either hand or carpal tunnel syndrome or neuropathy. (EX. 3, p. 8).

In Dr. Willetts' opinion, Claimant was not disabled as a result of her April 18, 1990 and November 12, 1991 shoulder injuries. Claimant was currently partially disabled as a result of her January 23, 1995 injury. However, this injury was not the sole cause of her disability, because she subsequently developed left hand pain. Dr. Willetts believed that Claimant was not totally disabled and was capable of performing select work provided that she avoided rapid, repetitive hand use. Dr. Willetts concluded that Claimant had reached MMI from the April 1990 incident in June 1990. She had reached MMI from the November 1991 injury in December 1991. She had reached MMI with regard to her upper extremity complaints on November 4, 1997.

Dr. Willetts assigned Claimant a six percent permanent partial impairment of the left upper extremity to reflect her left shoulder injury. (EX. 3, p. 9). He attributed four percent of this injury to Claimant's original shoulder injury of April 18, 1990. The remaining two percent of impairment was attributed to the November 12, 1991 injury. Based on Claimant's credible complaints of hand pain, combined with objective findings of tendonitis, Dr. Willetts assigned five percent permanent partial impairment to the right hand, attributed to the January 23, 1995 injury, and five percent to the left hand, attributed to a March 23, 1995 injury.

Dr. Willetts concluded that all of Claimant's injuries were causally related to her employment. The April 18, 1990 injury combined with the November 12, 1991 injury to produce a materially and substantially greater injury than what would have been produced by the second injury alone. Likewise, these two injuries combined with the January 23, 1995 injury to produce materially and substantially greater injury than what would have been produced by the last injury alone. (EX. 3, p. 10).

May 31, 2000 Visit

Since Claimant's last appointment with Dr. Willetts, she had worked for about six weeks at AC Technologies putting circuit boards in place. She reported that her symptoms had increased during that time. Claimant then worked at Handy and Harmon putting two-inch copper plates on racks. While working there, she felt soreness in her shoulder one day in December 1998. Claimant went to the emergency room and was referred to Dr. Goldstein, with whom she began treating. (EX. 3, p. 13). Claimant underwent shoulder and thumb surgery in 1999 and was considering undergoing tendon release operations on both wrists. (EX. 3, pp. 13-14). She had not returned to work since the December 1998 shoulder strain incident. (EX. 3, p. 21).

After examining Claimant, Dr. Willetts diagnosed her with chronic synovitis of both hands with mild de Quervain's tenosynovitis first dorsal compartments radial aspect both wrists. He noted that Claimant continued to complain of left scapular pain, despite her shoulder surgery. All other diagnoses remained the same as Dr. Willetts' initial impressions in May 1998.

Dr. Willetts' opinion on the nature and extent of Claimant's disability remained largely unchanged since his first report. (EX. 3, pp. 18-20). The December 1998 injury combined with all of Claimant's previous injuries to produce a materially and substantially greater injury than what would have been produced from this most recent injury alone. (EX. 3, p. 21). Thus, Dr. Willett assigned an additional four percent permanent partial disability to Claimant's left upper extremity because of the December 1998 shoulder strain, such that she now had a ten percent disability of the left upper extremity. (EX. 3, pp. 19-20).

Noting that Claimant had reported an increase in her hand symptoms after sweeping one day at a temporary job in 1998, Dr. Willetts opined that Claimant's hand disability was probably not solely due to her January 23, 1995 and March 23, 1995 injuries. (EX. 3, p. 18). Because of the possibility that Claimant might undergo tendon release surgery on both hands, Dr. Willetts concluded that she was not yet at MMI with respect to either hand. He speculated that if Claimant did undergo the surgery, her impairment rating as to each hand would likely decrease. (EX. 3, p. 20).

Dr. Willetts opined that Claimant's mild de Quervain's tendonitis appeared to be caused at least in part by her work for Employer, as well as her work at the other jobs she obtained after being laid off. He noted that there was no indication for surgery until some time after Claimant had been laid off. Dr. Willetts felt that surgery for this condition was a reasonable course of treatment. (EX. 3, p. 22).

On October 4, 2000, Dr. Willetts clarified some of his opinions from this report. He opined that Claimant would not have had the left shoulder surgery but for the December 1998 injury. Dr. Willetts did not consider Claimant's increase of symptoms while working at AC Technologies to be a new injury. (EX. 3, p. 23). He did, however, believe that the December 1998 shoulder strain at Handy and Harmon was a new injury. Dr. Willetts did not think that tendon release surgery would have been necessary without Claimant's work at AC Technologies and Handy and Harmon, as well as her needlepoint hobby. (EX. 3, p. 24).

May 1, 2003 Visit

Since the last time that Claimant saw Dr. Willetts, she had undergone the de Quervain's tendon release surgery on the left wrist in 2001. She had been released to light duty by Dr. Goldstein, with limitations on repetitive work, pushing or pulling,

overhead work and lifting (no more than twenty pounds). Claimant had not been treated for her left shoulder since the 1999 surgery. Claimant was not taking medication for her pain. (EX. 3, p. 26). She elected not to undergo the tendon release on her right hand because she had not experienced relief from the surgery on her left hand. (EX. 3, p. 33).

Claimant reported some left shoulder pain with overhead reaching and occasional numbness over the right index and middle fingers. She was able to do activities for only short periods of time before getting left shoulder and/or hand symptoms. (EX. 3, p. 27). After physical examination, Dr. Willetts concluded that Claimant would continue to have complaints and symptoms in the foreseeable future. (EX. 3, p. 31). Most of his other findings were unchanged from his previous examination of Claimant. (EX. 3, pp. 31-33).

Dr. Willetts opined that there was no need for further formal treatment. He felt that the best treatment would be to return Claimant to productive and fulfilling activity within her work restrictions. (EX. 3, p. 32). Dr. Willetts found that Claimant had reached MMI with regard to her left wrist in late 2001, three months after the tendon release surgery. All other MMI dates remained unchanged. (EX. 3, pp. 33-34).

According to Dr. Willetts, Claimant was not able to return to her former employment but was able to do a wide variety of limited duty work. He suggested the following restrictions: no repetitive use of the left hand above the shoulder, no lifting more than ten pounds with the left hand above mid-chest height or above the left shoulder, no pushing or pulling more than twenty pounds with the left hand and no rapid, forceful repetitive exertional activities, vigorous gripping or pinching with the hands. Dr. Willetts believed that Claimant was capable of doing light delivery, inspection work, telemarketing and counter or reception work. (EX. 3, p. 34).

Vocational Evidence

Vocational Rehabilitation Reports of Jeanne L. McCluskie and Karen A. Davis

Ms. McCluskie met with Claimant several times from April 2000 through October 2000 to assist Claimant with vocational rehabilitation. (CX. 26, pp. 1-11). Although Claimant was cooperative and expressed a desire to return to the workforce, her medical status was unclear at the time because of the possibility of surgery. (CX. 26, pp. 2, 5, 8). After a few months, the surgery still had not been authorized or scheduled, so Ms. McCluskie ultimately recommended that Claimant's file be closed because of the instability of her condition. (CX. 26, p. 11).

After Claimant underwent the surgery in question and was released with permanent restrictions by Dr. Goldstein, she met with Ms. Davis several times from January 2002 through October 2002 for vocational rehabilitation counseling. (CX. 26, pp. 12-34). Claimant initially was amenable to vocational rehabilitation and looked

forward to obtaining employment. Claimant told Ms. Davis that she preferred working with things rather than with people. (CX. 26, p. 14). In April 2002, Ms. Davis felt that Claimant was no longer interested in pursuing vocational rehabilitation, but by the end of May 2002, Claimant had a more positive attitude about the job search and began actively seeking employment and keeping a job placement log. (CX. 26, pp. 20, 22-23, 25).

By July 2002, Claimant was being very conscientious in updating Ms. Davis about her job search situation. She had attempted to work at an embroidery company, but the work caused pain and numbness in her fingers. (CX. 26, p. 25). By August 2002, Claimant had put in applications at approximately thirteen temporary to permanent placement agencies and had also reapplied to work for Employer. She had not received any response to her applications. (CX. 26, p. 27). Ms. Davis felt that Claimant's restrictions and the fact that she had been on workers' compensation were both contributing factors in her inability to be hired. (CX. 26, p. 28). Claimant attempted to do another day of work, this time putting jewelry on cards at a factory, but she could not continue because of the physical requirements of the job. (CX. 26, p. 29). Ms. Davis continued to feel that Claimant was putting forth a good faith effort to obtain employment, although Claimant was becoming frustrated with the lack of response from potential employers. (CX. 26, p. 30).

In October 2002, Ms. Davis determined that all resources had been exhausted. She felt that Claimant had the knowledge and abilities to seek employment on her own and no longer required assistance. She recommended that Claimant continue to look for work and that Claimant's file be closed. (CX. 26, p. 33).

March 26, 2003 Labor Market Survey by Elizabeth Sinatro

This labor market survey identified three feasible occupational alternatives for Claimant—security guard, cashier and customer service representative. A security guard position at Shaw's Supermarket paid $10+ per hour depending on experience. Previous experience was preferred. Duties of the job included detecting shoplifters, monitoring closed circuit television, representing Shaw's in court proceedings and completing store audits as required. Ms. Sinatro felt that this job met Claimant's physical restrictions, as there was less than one hour required for reaching above shoulder level, pushing, pulling, squatting, kneeling and climbing. No lifting over ten pounds and no repetitive wrist movements were involved. (EX. 4, p. 2).

Pinkerton Security had security guard positions available. Salary ranged from $7 to upwards of $10 per hour depending on experience. Duties included monitoring/securing local business/property, occasional foot rounds, documenting activity, monitoring security cameras or closed caption television and contacting local authorities as needed. According to Ms. Sinatro, Pinkerton had job opportunities within Claimant's restrictions. The physical requirements were the same as those for the

security guard position at Shaw's. A security guard position with Blackstone Valley Security paid from $8 to upwards of $12 per hour depending on experience and assignment. The duties included monitoring security cameras and entrances/exits and reporting suspicious behavior. According to Ms. Sinatro, Blackstone also had job opportunities within Claimant's restrictions. The physical requirements were the same as those for the other two security positions. (EX. 4, p. 3). Security guard jobs at the Providence Biltmore Hotel and the Ann & Hope Outlet Shops fell within the same pay range as the other security positions. These jobs involved essentially the same duties and same physical requirements as the other positions. Ms. Sinatro concluded that Claimant could expect to earn between $320 and $480 per week as a full-time security guard. (EX. 4, p. 4).

Ms. Sinatro next identified three cashier positions for Claimant. The cashier jobs at CompUSA and CVS paid $6.50 to $7.50 per hour depending on experience. Training was provided. A cashier job at Home Depot paid $8 to $9 per hour depending on experience. Previous customer service experience was preferred. The duties of these jobs included scanning purchases, accepting payment, keeping the work area clean and bagging purchases. According to Ms. Sinatro, the physical requirements of each job fell within Claimant's restrictions and were the same as the requirements of the security guard positions. (EX. 4, pp. 5-6). Ms. Sinatro concluded that Claimant could expect to earn between $260 and $360 per week on a full-time basis as a cashier. (EX. 4, p. 6).

Ms. Sinatro also identified two customer service representative positions for Claimant, but in her deposition, she testified that she no longer felt that these jobs fit within Claimant's physical restrictions. (EX. 4, pp. 6-7; EX. 6, p. 17).

IV. DISCUSSION

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 200 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indem. Co. v. Bruce, 666 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Ass'n, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 928 (1968). It has been consistently held that the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967).

However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the claimant when evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which specifies the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), aff'g 990 F.2d 730 (3d Cir. 1993).

I found Claimant in this case to be a credible witness and I have weighed her testimony accordingly.

Nature and Extent

Having established work-related injuries, the burden rests with the claimant to prove the nature and extent of his disability, if any, from those injuries. Trask v. Lockheed Shipbldg. Constr. Co., 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). James v. Pate Stevedoring Co., 22 BRBS 271, 274 (1989); Trask, 17 BRBS at 60. Any disability before reaching MMI would thus be temporary in nature. The date of MMI is a question of fact based upon the medical evidence of record. Ballestros v. Willamette W. Corp., 20 BRBS 184 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979). An employee reaches MMI when his condition becomes stabilized. Cherry v. Newport News Shipbldg. & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enter., Ltd., 14 BRBS 395 (1981).

The Parties in this case have stipulated that Claimant reached MMI on November 19, 2001.

As a general rule, if an injury occurs to a body part specified in the statutory schedule, then the injured employee is limited to the permanent partial disability schedule of payments contained in Section 908(c)(1) through (20). The rule that the schedule of payments is exclusive in cases where the scheduled injury, limited in effect to the injured part of the body, results in a permanent partial disability was thoroughly discussed by the Supreme Court in Potomac Elec. Power Co. v. Director, OWCP, 449 U.S. 268 (1980) [hereinafter "PEPCO"]. However, a scheduled injury can give rise to permanent total disability pursuant to § 908(a) in a situation where the facts show that the injury prevents a claimant from engaging in the only employment for which he is qualified. PEPCO, 449 U.S. at 277 n.17. Therefore, if a claimant establishes that he is totally disabled, the schedule becomes irrelevant. Dugger v. Jacksonville Shipyards, 8 BRBS 552 (1978), aff'd 587 F.2d 197 (5th Cir. 1979).

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940). Disability under the Act means an incapacity, as a result of injury, to earn wages which the employee was receiving at the time of the injury at the same or any other employment. 33 U.S.C. § 902(10). In order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Economic disability includes both current economic harm and the potential economic harm resulting from the potential result of a present injury on market opportunities in the

future. Metropolitan Stevedore Co. v. Rambo (Rambo II), 521 U.S. 121, 122 (1997). A claimant will be found to have either no loss of wage-earning capacity, no present loss but a reasonable expectation of future loss (de minimis), a total loss or a partial loss.

A claimant who shows he is unable to return to his former employment has established a prima facie case for total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. P & M Crane v. Hayes, 930 F.2d 424, 430 (5th Cir. 1991); New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total compensation until the date on which the employer demonstrates the availability of suitable alternative employment. Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991).

The Parties in this case agree that Claimant was entitled to permanent total disability compensation at least from November 19, 2001, through March 25, 2003. Employer in this case concedes that Claimant has made a prima facie showing of total disability and that Employer has the burden of showing suitable alternative employment.

Suitable Alternative Employment

Once a claimant has established a prima facie case for total disability, the employer may avoid paying total disability benefits by showing that suitable alternative employment exists that the injured employee can perform. The claimant does not have the burden of showing there is no suitable alternative employment available. Rather it is the duty of the employer to prove that suitable alternative employment exists. Shell v. Teledyne Movable Offshore, 14 BRBS 585 (1981); Smith v. Terminal Stevedores, 111 BRBS 635 (1979). The employer must prove the availability of actual identifiable, not theoretical, employment opportunities within the claimant's local community. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981), rev'g 5 BRBS 418 (1977); Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980). The specific job opportunities must be of such a nature that the injured employee could reasonably perform them given his age, education, work experience and physical restrictions. Edwards v. Director, OWCP, 999 F.2d 1374 (9th Cir. 1993), cert. denied, 511 U.S. 1031 (1994); Turner, 661 F.2d at 1041-1042. The employer need not place the claimant in suitable alternative employment. Trans-State Dredging v. Benefits Review Bd. (Tarner), 731 F.2d 199, 201, 16 BRBS 74, 75 (CRT) (4th Cir. 1984), rev'g 13 BRBS 53 (1980); Turner, 661 F.2d at 1043; 14 BRBS at 165. However, the employer may meet its burden by providing the suitable alternative employment. Hayes, 930 F.2d at 430.

If the employer has established suitable alternative employment, the employee can nevertheless prevail in his quest to establish total disability if he demonstrates that he tried diligently and was unable to secure employment. Hooe v. Todd Shipyards Corp., 21

BRBS 258 (1988). The claimant must establish a reasonable diligence in attempting to secure some type of suitable employment within the compass of opportunities shown by the employer to be reasonably attainable and available and must establish a willingness to work. Turner, 661 F.2d at 1043.

Employers may rely on the testimony of vocational experts to establish the existence of suitable jobs. Turney v. Bethlehem Steel Corp., 17 BRBS 232, 236 (1985); Southern v. Farmers Export Co., 17 BRBS 64, 66-67 (1985); Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231, 233 (1984); Bethard v. Sun Shipbldg. & Dry Dock Co., 12 BRBS 691 (1980); Pilkington v. Sun Shipbldg. & Dry Dock Co., 9 BRBS 473; 477-80 (1978). See also Armand v. American Marine Corp., 21 BRBS 305 (1988) (job must be realistically available). The counselors must identify specific available jobs; market surveys are not enough. Campbell v. Lykes Bros. Steamship Co., 15 BRBS 380, 384 (1983); Kimmel v. Sun Shipbldg. & Dry Dock Co., 14 BRBS 412 (1981). See also Williams v. Halter Marine Serv., 19 BRBS 248 (1987) (must be specific, not theoretical, jobs). The trier of fact should also determine the employee's physical and psychological restrictions based on the medical opinions of record and apply them to the specific available jobs identified by the vocational expert. Villasenor v. Marine Maintenance Indust., 17 BRBS 99, motion for recon. denied, 17 BRBS 160 (1985). To calculate a claimant's wage earning capacity, the trier of fact may average the wages of suitable alternative positions identified. Avondale Indust. v. Director, OWCP, 137 F.3rd 326 (5th Cir. 1998).

Employer argues that it established suitable alternative employment for Claimant in a March 26, 2003 labor market survey. Although Ms. Sinatro, who prepared the labor market survey, conceded in her deposition that the customer sales representative job did not fit within Claimant's restrictions, she felt that the cashier and security guard jobs were still available for Claimant. Ms. Sinatro testified that the CompUSA cashier job involved no lifting over ten pounds and was otherwise within Claimant's restrictions, but she did not visit the CompUSA where she identified the job. When Claimant received the labor market survey and went to another CompUSA to apply for the job, she observed cashiers scanning items, which involved constant and repetitive hand, elbow and shoulder movements. In addition, cashiers scanned boxes containing reams of paper, which required them to lift more weight than Claimant is authorized to lift under her restrictions. Ms. Sinatro testified that at Home Depot, the cashiers typically do not have to lift and scan items and instead use a hand wand to scan items in a customer's shopping cart. Ms. Sinatro did not, however, visit the Home Depot where she identified the job. When Claimant visited another Home Depot, she observed cashiers lifting several types of heavy items, including paint, Venetian blinds, lumber, carpet and boxes of floor tile. Most items were scanned at the counter, rather than remaining in the customer's cart. When Claimant applied for a cashier job at Shaw Supermarket, she likewise saw cashiers scanning several types of items which would exceed her weight lifting restrictions.

According to Claimant's hearing testimony, she is unable to do much work with her hands before pain and swelling develop. Although Dr. Goldstein did not know how to explain this phenomenon, he seems to have accepted Claimant's complaints at face value, as he included the "no repetitive wrist movement" limitation in Claimant's list of permanent restrictions. Dr. Goldstein testified that if Claimant had a cashier job, she would have more difficulty with lifting and carrying items than she would have with scanning them. At the hearing, I found Claimant to be a credible witness, and I too accept her subjective complaints as valid. Consequently, I find that the cashier job does not constitute suitable alternative employment for Claimant. This type of job, which involves constant scanning and lifting of items while working, necessarily also requires repetitive hand, arm and wrist movements. Since Claimant is not to engage in repetitive wrist movements or lifting activities for more than one hour a day, it would be unreasonable to expect her to engage in such movements as a matter of course during a full eight hour workday.

I note as well that by the time Claimant was furnished a copy of the labor market survey and began applying for cashier jobs, the jobs identified were no longer available for her. CompUSA was not hiring, and CVS and Shaw never responded to Claimant's job application.

As for the security jobs, Claimant argues that the labor market survey did not provide enough information about the actual physical requirements of the job, other than to indicate that these jobs fell within Claimant's physical restrictions. Based on the potential job duties listed for each security job, however, it does appear that Claimant is physically capable of performing this type of work, particularly since it does not require any lifting or repetitive wrist movements. While Claimant is likely physically capable of doing at least some types of security jobs, thus making the security guard job a possible form of suitable alternative employment, at least in theory, the fact remains that Claimant was not hired for the Pinkerton job, and two other jobs had been filled at the time that she inquired about them. When Claimant applied with Pinkerton, she had to take an honesty survey. After the results were calculated, Claimant was told that she did not meet the job qualifications and that she could reapply in six months. Claimant assumed she had failed the survey, although her responses to questions about stealing in the workplace hardly seem objectionable. Although Claimant did not apply for the Blackstone Valley job, it is likely that she assumed that she was not qualified for security work after her experience with Pinkerton. Thus, there is no evidence that this form of suitable alternative employment is actually available to Claimant, given her lack of security experience and her physical restrictions.

The record reflects that Claimant has been diligent in seeking employment, both with the assistance of vocational counselors and labor market surveys and on her own. Ms. Davis' vocational counseling reports from 2002 indicate that Claimant put forth a good faith effort in seeking employment during that time. Claimant testified that she

found two jobs which she was unable to do for more than one day, and since that time, she has continued to look for work, particularly as a cashier, security guard or assembly line work. Since receiving the labor market survey, Claimant has applied for several jobs on her own in addition to those on the labor market survey, and she continues to look for job opportunities in the newspaper. Nonetheless, she has only been offered one job, and that job involved selling vacuum cleaners, which are too heavy for her to lift. When Claimant filled out her job applications, she accounted for all gaps in her employment history and explained that she was unemployed and on workers' compensation. According to Ms. Davis' vocational counseling reports, Claimant's physical restrictions and the fact that she was on workers' compensation were both contributing factors in her inability to be hired by prospective employers. Claimant testified that she has had difficulty finding employment because she lacks experience with regard to certain kinds of work and is overqualified with regard to other kinds of work. Despite these difficulties, Claimant's willingness to obtain employment is evidenced by her recent decision to begin selling Avon products. Under the Act, Claimant's willingness to work and her reasonable diligence in seeking alternative employment, in conjunction with the fact that she nevertheless has been unable to obtain a suitable position, all combine to render her permanently totally disabled at the present time.

While Claimant now sells Avon products, she has only been engaged in this venture for a short time, and at the time of her deposition, had made about $170 in three weeks of selling. In light of the benevolent purpose of the Act, it would be unfair to treat this venture as suitable alternative employment at this juncture. Consequently, at this point, I find that the Avon job is a speculative venture which does not fit within the category of suitable alternative employment.

I find that Employer has failed to establish suitable alternative employment as to the cashier position. I find that even if the cashier position was suitable alternative employment, Claimant has established that she has been unable to obtain this employment even through the exercise of reasonable diligence. I find that although the security guard position is likely suitable alternative employment, Claimant once again has established that she was unable to obtain this type of job—or any other form of suitable alternative employment—through the exercise of reasonable diligence. Claimant is therefore entitled to permanently totally disability compensation starting from November 19, 2001, and continuing until such time as Employer establishes suitable alternative employment.

Conclusion

Based on the foregoing findings of fact, conclusions of law and the entire record, I hereby enter the following compensation order. All other issues not decided herein were rendered moot by the above findings.

ORDER

It is hereby ORDERED, ADUDGED AND DECREED that:

1. Claimant was paid the correct amount of temporary disability compensation prior to November 19, 2001.

2. Employer shall pay Claimant permanent total disability compensation commencing on November 19, 2001, and continuing, based on an average weekly wage of $700.90.

3. Employer shall receive a credit for benefits and wages paid.

4. Employer shall pay Claimant interest on any accrued unpaid compensation benefits at the rate provided by 28 U.S.C. § 1961.

5. Within thirty days of receipt of this Order, counsel for Claimant should submit a fully-documented fee application, a copy of which shall be sent to opposing counsel, who shall have twenty days to respond.

6. All computations of benefits and other calculations which may be provided for in this order are subject to verification and adjustment by the District Director.

ORDERED this 2nd day of December, 2003, at Metairie, Louisiana.

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LARRY W. PRICE
Administrative Law Judge

LWP:bbd